IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether or not purposeful discrimination is a prerequisite to liability under 42 U.S.C. §1981.
2. If the answer to the first question is in the affirmative, whether or not there was a showing of purposeful discrimination in the instant case.
3. Whether or not Defendants may raise the standing issue before this Court.
4. Whether or not the hiring order which issued below is appropriate and is constitutional as "mirroring" the illegal discrimination proven.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Background

The Plaintiffs/Respondents in this case are blacks and Mexican-Americans ("Plaintiffs"). The Defendants/Petitioners are the County of Los Angeles and two constituent agencies of that County ("Defendants").

This action was commenced on January 11, 1973. The original complaint alleged violations of 42 U.S.C. §1981 ("Section 1981") and 42 U.S.C. §1983, as

well as the Fourteenth Amendment (R. 1-9).[1] By way of a Second Amended Complaint filed on May 3, 1973, allegations were added that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* ("Title VII") had been and was being violated (R. 60-68). Attached as copies to that Second Amended Complaint were copies of the Plaintiffs' charges filed with the Equal Employment Opportunity Commission ("EEOC") and the "right to sue" letters which had been issued to the Plaintiffs pursuant to Section 706(f)(1) of Title VII (R. 69-73).

The case proceeded to trial on June 5, 1973 and June 6, 1973 (Tr. 1-262).[2] In addition to the oral testimony and thirteen exhibits which were admitted into evidence at trial, the evidence before the District Court included extensive and extremely important stipulations of fact between the parties. These stipulations are found in a Pre-Trial Order filed and signed by the Court at the commencment of trial (R. 132ff; stipulations at 136-141).

The District Court found that Defendants had engaged in discriminatory employment practices violative of Title VII and Section 1981 (R. 163-164).

The Judgment entered by the District Court established a forty percent minority annual hiring goal (R. 167). The Judgment, which has been in effect since July, 1978 (R. 166), specifically provides at paragraph seven that the hiring order shall not be deemed "to require or encourage" defendants to hire unqualified firefighters or "to lower or refrain from increasing job-related standards" (R. 168). The Judgment pro-

[1]"R." refers to a reference to the record in the Court of Appeals, which has been forwarded to the Supreme Court.

[2]"Tr." refers to the Trial Transcript which is part of the record on appeal and which has been forwarded to the Supreme Court.

vides that the decree is "subject to modification" in the event the hiring order is in conflict with the above-stated terms of paragraph seven (R. 168). No modification of the decree has been sought by Defendants during the five years of its operation; indeed, the result of the Judgment has been that, despite the fact there were virtually no minorities employed as of the date this lawsuit was commenced (R. 136), 207 minority firemen have been hired since the Judgment was entered (Defendants' Brief, p. 10).

B. Liability

The primary basis for the District Court's finding of liability is found at finding of fact number two (R. 160) and at conclusion of law number four (R. 163) which read as follows:

> "2. The workforce at the time the complaint herein was filed, at the Los Angeles County Fire Department, consisted of 1,762 firemen, of whom nine (0.5%) are black and fifty (2.8%) are Mexican-American. In Los Angeles County, 10.8% of the inhabitants are black and 18.3% are Mexican-American. Defendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department, as compared to the general population statistics for those minority groups.
>
> . . .
>
> "4. In cases involving discrimination based on race and national origin, 'statistics often tell much, and Courts listen.' *Alabama v. United States,* 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam,* 371 U.S. 37 (1962). In employment discrimination cases it consistently has been held that where employment statistics, such as those before the

Court, reveal a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a *prima facie* case of discrimination is established. See e.g., *United States v. Local 86, Ironworkers,* 315 F. Supp. 1202, 1236 (W.D. Wash., 1970), *aff'd* 443 F.2d 544, 551 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971); *United States v. Hayes International Corp.,* 456 F.2d 112, 120 (5th Cir. 1972); *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421, 426 (8th Cir. 1970). Defendants in this case did not rebut the *prima facie* case for Plaintiffs established by the statistics, *cited* in Findings of Fact Number Two (2)."

The evidence as found in the Pre-Trial Order stipulations and as adduced at trial showed that Defendants had engaged in numerous employment practices which operated to the detriment of minorities and which were not job-related or justified by business necessity. The evidence as to these practices, most of which were carried out both before and after March, 1972, when Title VII became applicable to public employers, can be summarily described as follows:

1. Recruitment

The head of the County Personnel Department testified at trial that prior to 1969 Defendants did little or no recruiting in black and Mexican-American communities, but instead relied on "word of mouth" recruitment by their all white workforce (Tr. 30-32).

It also was admitted at trial by the head of the County Personnel Department that the Los Angeles County Fire Department had a reputation as a discriminatory employer in the minority communities of Los

Angeles County due to the fact few minorities are employed (Tr. 52). In apparent reference to the failure to recruit despite the bad reputation, the District Court specifically found that Defendants had engaged in the illegal employment practice of "failing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and Mexican-Americans."

2. Written Tests

Stipulations found in the Pre-Trial Order (R. 138-139) show that "for several years" Defendants had administered written tests to applicants for hire as firefighters which had an extremely severe adverse impact upon black and Mexican-American applicants; indeed, for example, in 1969 approximately 25% of the applicants were black and Mexican-American (R. 137), but, as a result of the written test, only five blacks and seven Mexican-Americans were hired as compared to 175 whites (R. 138).

It was stipulated in the Pre-Trial Order (R. 139) that "[n]o studies establishing the validity of the written entrance tests have been conducted according to the procedures set forth in the Equal Employment Opportunity Commission Guidelines, 29 CFR §1607, 35 Fed. Reg. 12333 (August 1, 1970)."

Defendants realized as early as May, 1971 that their written tests violated applicable federal law. Plaintiffs' Exhibit 8, received into evidence at trial,[3] is a memo from the head of the Los Angeles County Personnel Department to the Los Angeles County Civil

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[3]For the Court's convenience, a complete copy of Plaintiffs' Exhibit 8 is attached hereto as Appendix "A".

Service Commission. Page three of this memo is entitled a "Fact Sheet on the Fireman Exam" and reads as follows in relevant part:

> "3. The current test for Fireman *does* discriminate against minorities. (Although we had over 407 Blacks applying for Fireman the last time this test was given, only four were within appointment range on the list and hired. Of 126 Chicanos, only 5 were within reach on the list and subsequently hired.)
>
> "4. A recent Federal Supreme Court decision on testing, Griggs et al v Duke Power Company, holds that this type of test is in violation of the Civil Rights Act of 1964.
>
> . . .
>
> "6. We are not staffed to interview all of the 5000 plus candidates whom we estimate will apply for Fireman on an open-competitive examination, and *the alternative of using our existing written examination as an administrative device for selecting a group of applicants whom we can interview for the Fireman positions (approximately 600 applicants to be interviewed for 80 jobs) places us in the position of knowingly discriminating.*" (second emphasis added).

Despite the above-quoted memorandum which stated that use of the written test "places us in the position of knowingly discriminating", on December 1, 1972, the head of the County Personnel Department formally recommended by way of a memorandum that the written test be used to eliminate all candidates except the top 500 (Plaintiffs' Exhibit 7). This memorandum of December 1, 1972, itself recognized "there is some possibility that this action will be challenged in the Courts". This practice of interviewing the top 500 candidates (544 actually were interviewed) had the

effect of continuing the severe adverse impact of the written test because of those to be interviewed, only 1.8% were black and 6.0% were Mexican-Americans (R. 140-41).

As was anticipated in the December 1, 1972 memo, the Defendants' practice of utilizing the written test was "challenged", namely by the instant lawsuit. In response to this lawsuit, and only because of this lawsuit, Defendants discontinued the utilization of the written test (R. 140-41; Tr. 48-49).

Despite the fact the tests had been utilized in earlier years to decide which applicants would be placed at the top of the list of persons to be hired (R. 138), the head of the Los Angeles County Personnel Department testified that in his opinion it is not possible to devise a written test for a job such as firefighter which validly ranks applicants (Tr. 55).

3. Height Requirement

It was stipulated by the parties that prior to 1971 Defendants required all applicants to be 5′8″ in height, that in 1971 the requirement was lowered to 5′7″, and that "no studies have been conducted establishing the validity of the height standards" (R. 140). It also was stipulated at trial that 45% of the Mexican-Americans in Los Angeles County, as compared to approximately 14% of the whites, are eliminated by a 5′7″ height requirement (Tr. 200).

The District Court concluded that the height requirement was legal, but the Ninth Circuit Court of Appeals reversed (R. 163; 566 F.2d at 1341-42). Defendants' petition for certiorari did not challenge the Court of Appeals holding that the height requirement is violative of Title VII.

C. Relief

The District Court entered a Judgment which, among other things, established a goal for Defendants of hiring twenty percent blacks and twenty percent Mexican-Americans as new firefighters (R. 167). The District Court made it clear that the goals established by the Judgment were not impermissible "quotas" since paragraph seven of the Judgment (R. 168) reads as follows:

> "7. Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph numbered seven (7) and shall be subject to modification in the event of any conflict herewith."

In Finding of Fact number six (R. 161), the District Court explained the need for the establishment of the goals, stating as follows:

> "6. The accelerated hiring to be ordered by the Court is based on all Findings, including the following considerations:
>
> (a) it seems evident, as officials of Defendants testified at the trial, that Defendants will have no difficulty finding sufficient numbers of qualified black and qualified Mexican-American potential firemen to fill the required ratios;
>
> (b) it is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of Defendants;

> (c) it appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past discrimination within a reasonable period of time;
>
> (d) it appears that a Court order requiring accelerated hiring of minorities will aid those officials of Defendants who desire the elimination of the effects of past discrimination, in that such an order in all likelihood will make minority recruiting efforts more effective."

The grounds for Finding of Fact 6(c), quoted immediately above, to the effect that absent the hiring order the effects of the past discrimination would not be eliminated, are obvious. As described and discussed above in Section "B.2." of the Statement of the Case, in December of 1972 and January of 1973, several months after Title VII became applicable to public employers, Defendants were in the process of utilizing a written test which Defendants *knew* was illegal. The practical need of Court-imposed goals for such an employer need not be elucidated.

Chief Barlow of the Los Angeles County Fire Department was called as a witness by the *Plaintiffs* at the trial. During his testimony the following exchange occurred between the Court and Chief Barlow:

> "THE COURT: All right. Now, I already felt that I may have asked you the questions that may have been unfair to you in your position and put you on the spot. I have no desire so to do. But I am anxious to get whatever point of view I can from you as a responsible representative of the fire department.
>
> If I were to make an order requiring that any hiring of fire department personnel be of a particu-

lar racial proportion, as you sit there now, do you see any way in which that would pose an unfortunate problem to the fire department?

THE WITNESS: *Only* that it would reflect that we did not have the ability to meet our obligation and our commitment. I think that in terms of the personnel of the department, their reflection would be that—or an inference that some lack of standard was—or a standard was not followed that would be somewhat less than what they've had in the past. I think the answer is simple. I feel that my main concern would be the fact that we have not performed in terms of what our responsibility was.

THE COURT: Well, in actuality you haven't, have you?

THE WITNESS: *That's right.*" (emphasis added) (Tr. 193).

Chief Barlow also testified as follows (Tr. 150-51) concerning the advisability of a Court-imposed hiring order:

"Q Is it fair to say, Chief Barlow, that in your opinion if the Court issued a hiring ratio in this case which required the hiring of one black and one Mexican American for each white hired, that there would be no problem in the fire department?

A I would not anticipate this.

THE COURT: You would not anticipate any problem?

THE WITNESS: Any problems."

At trial there also was uncontradicted expert testimony from an industrial psychologist that a hiring order would produce applicants "as well qualified as those selected in the past" (Tr. 212-213). Similarly,

the head of the Los Angeles County Personnel Department testified that in his opinion a Court-imposed hiring order would not affect the quality of firefighters hired (Tr. 60-61).

The District Court did not explain the reason forty percent was chosen as the annual hiring goal, other than to state that the goal would have been higher for Mexican-Americans but for the District Court's determination that the height requirement was legal (R. 161-162). It is noteworthy, however, that in July, 1972, the head of the Los Angeles County Personnel Department had stated in a memorandum to the County Civil Service Commission that "a goal of 50% minorities for all new firemen hires seems reasonable. . . ." (Plaintiffs' Exhibit 9, at p. 2). Similarly, the head of the Personnel Department testified at trial that he had recommended a procedure whereby only County employees could apply to be firefighters, in the belief that such a procedure would cause an "increase" in minority representation in the fire department "in greater numbers than the population and the general public" (Tr. 52-54, 69-70).

D. Cessation of Discrimination

In their memorandum, Defendants repeatedly refer to the fact that no "discriminatory hiring" took place at the Los Angeles County Fire Department after the effective date of Title VII. The Court should be aware that this version of the facts is only technically true. The more basic point and a more accurate description of the true facts is that: (a) long after the effective date of Title VII, Defendants were in the process of carrying out a hiring program based on a testing system which Defendants *knew* violated Title VII (See Section "B" of Statement of Facts above); and (b) Defendants ceased these illegal practices solely in re-

sponse to the instant lawsuit (See Section "B" of Statement of Facts above).

Plaintiffs submit that under these circumstances the factual situation before the District Court can most accurately be described as being one where prior to the effective date of Title VII, Defendants engaged in various employment practices which had the effect of virtually excluding minorities from employment as firefighters and after Title VII became applicable, Defendants continued these practices until learning that this lawsuit was to be brought. Due to the fact, however, that no hiring was actually consummated between March, 1972 and the date of the commencement of the instant lawsuit, no illegal hiring was actually completed after the effective date of Title VII. This point is of no particular importance, however, since the instant lawsuit also was prosecuted under Section 1981, assuming of course that Title VII principles and standards of liability are applicable in Section 1981 cases.

E. Court of Appeals

On appeal to the Ninth Circuit Court of Appeals, by way of an opinion dated October 20, 1976, the Ninth Circuit at first upheld the District Court in all respects other than a ruling that the District Court had erred in holding Defendants' height requirement to be job-related. The Ninth Circuit instructed the District Court to reconsider upon remand its limitation on the hiring order due to the Court of Appeals reversal on the height issue (See Appendix "B" to Petition for Certiorari).

Defendant then filed a petition for rehearing, arguing that this Court's ruling in *Washington v. Davis*, 426 U.S. 229 (1976) required a holding that wilful or purposeful discrimination must be proven before liability can be established under Section 1981. The Ninth

Circuit reheard the case and issued a new opinion on December 14, 1977. 566 F.2d 1334.

In this December, 1977 opinion the Ninth Circuit ruled that this Court's opinion in *Washington v. Davis* is limited to "constitutional issues" and therefore is inapplicable to Section 1981 cases. 566 F.2d at 1339-41. Also in this new opinion, although the issue was not before the Court on the petition for rehearing, the Ninth Circuit noted that due to the fact the scope of the represented class did not include past applicants, Plaintiffs lacked standing to challenge a 1969 written test administered by Defendants. 566 F.2d at 1337-38. The Ninth Circuit ordered a remand and instructed the District Court to reconsider the hiring order not only in light of the reversal on the height requirement, but also in light of the holding that due to the narrow scope of the class the Plaintiffs lacked standing to challenge the 1969 written test. 566 F.2d at 1337-38.

F. Issues Before Supreme Court

The Petition for Certiorari by Defendants herein raises two issues, which can be stated as follows: (1) whether or not purposeful or wilful discriminatory intent is a prerequisite to liability under Section 1981; and (2) whether the scope of the hiring order and the relief afforded by the District Court is appropriate in view of the scope of the class represented by Plaintiffs and in view of statute of limitations considerations.

It appears to Plaintiffs that the second issue is not properly before the Supreme Court. This is the case because the Ninth Circuit Court of Appeals already has ruled that the case should be remanded to the District Court for a re-evaluation of the hiring order. 566 F.2d at 1343.

SUMMARY OF ARGUMENT

Plaintiffs' position before the Court is that the relief afforded below was entirely appropriate as "mirroring" the wrongs committed because intentional discrimination need not be proven to establish liability under Section 1981. The first reason that intended or wilful discrimination is not a prerequisite to liability under Section 1981 is that in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) this Court held that Title VII and Section 1981 are "directed to most of the same ends" and in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), this Court ruled that unintentional "artificial barriers" to minority employment are violative of Title VII. The second reason that intentional discrimination is not a prerequisite to liability under Section 1981 is that, as this Court recognized in *Griggs, Id.* at 430-31, as of 1964 Congress had declared that unintentional discrimination was prohibited in the employment field and, therefore, as of 1964 under the *in pari materia* canon of statutory construction, the non-intent standard became applicable to Section 1981. (See Point "I" of Argument, *infra.*)

At Point "II", *infra*, of the Argument, Plaintiffs also show that the record below is replete with evidence of intentional discrimination.

It also is Plaintiffs' position that the goals and timetables established in the District Court's hiring order are completely appropriate because: (a) other than due to an oversight which can and should be readily corrected on remand, Plaintiffs had standing to challenge Defendants' past discriminatory practices; (b) Defendants' statute of limitations arguments are inapplicable to this suit in equity; and (c) the goals and timetables found in the District Court's Judgment are appropriate for the purpose of eliminating the effects of past discrimination. (See Points "III" and "IV" of Argument, *infra.*)

ARGUMENT

I

WILFUL DISCRIMINATORY INTENT NEED NOT BE SHOWN UNDER SECTION 1981

A. Introduction

The principal thrust of Defendants' petition to the Supreme Court is that because the District Court found that Defendants had no wilful or conscious discriminatory intent (R. 162), and because no discrimination was *effectuated* (as opposed to "threatened") by Defendants after March, 1972 (when Title VII first became applicable to public entities), and because the relief afforded by the District Court was designed "to erase the effects of past discrimination" (566 F.2d at 1343; R. 164), no hiring order whatsoever can possibly be appropriate in this case assuming that wilful or purposeful discrimination is required to make out a violation of Section 1981.

In response, Plaintiffs' basic position is that wilful or purposeful discrimination is not required for a showing of liability in *employment discrimination cases* brought under Section 1981. In short, it is Plaintiffs' position that in lawsuits brought to enforce the right to make *employment* contracts guaranteed by Section 1981, Title VII standards as enunciated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) are applicable.

The arguments in support of Plaintiffs' position that no wilful or purposeful discrimination need be proven under Section 1981 can be outlined as follows:

1. The Supreme Court has ruled unequivocally in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) that Title VII and Section 1981 are "related, and . . . directed to most of the same ends". Since the two statutes are directed to "most of the same ends", it follows that the

most basic standards of liability in the two statutes must be identical.

2. Since Title VII and Section 1981 overlap in their coverage of employment discrimination, according to the long-established *in pari materia* canon of statutory construction, the standards of liability under the two statutes should be construed consistently. The relevant policy considerations militate in favor of applying consistent standards of liability to Title VII and Section 1981.

3. A careful reading of this Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976) shows that in that decision a non-intent standard was applied by the Court to a Section 1981 employment discrimination case. Further, the policy considerations relevant to the *Washington v. Davis* holding that purposeful intent must be shown to make out a violation of the Fifth and Fourteenth Amendments are not applicable to Section 1981.

4. The legislative history of Section 1981 shows that Congress intended the enactment to afford "practical freedom." In modern times, an intent standard would be inconsistent with this Congressional desire; indeed this Court has recognized that an intent standard in the employment field would result in legislation with no practical value.

5. No prejudice due to surprise or reliance will result to Defendants and other employers if a non-intent standard is applied to Section 1981. This is the case because of the fact the Courts of Appeals for almost a decade have continuously applied Title VII principles in Section 1981 cases; furthermore Defendants in the instant case believed Title VII to apply to their employment practices long before Title VII became applicable to public employers. By contrast severe prejudice due to

reliance will result to employment discrimination grievants if an intent standard is applied to Section 1981.

6. Application of a non-intent standard in Section 1981 cases would not constitute a retroactive application of Title VII.

B. Johnson v. Railway Express

The holding in the instant case by the Ninth Circuit Court of Appeals that Title VII standards for liability apply in Section 1981 employment discrimination cases is in accord with the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975). Here Mr. Justice Blackman, speaking for the Court, ruled as follows at 421 U.S. 459 and 461:

> "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' Alexander v. Gardner-Denver Co. 415 U.S. at 48, 39 L. Ed. 2d 147, 94 S. Ct. 1011. In particular, Congress noted 'that *the remedies available to the individual under Title VII are co-extensive with the indiv[i]-dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981;* and that the two procedures augment each other and are not mutually exclusive.' H.R. Rep. No. 92-238, p. 19 (1971). See also S. Rep. No. 92-415, p. 24 (1971).

* * *

> "We generally conclude, therefore, that the remedies available under Title VII and under §1981, *although related, and although directed to most of the same ends,* are separate, distinct, and independent." (emphasis added).

Plaintiffs submit that since the "remedies available" under Title VII and that part of Section 1981 which covers employment discrimination are "co-extensive," "related, and . . . directed to most of the same ends," it follows that the basic standard of liability, *i.e.*, whether purposeful intent to discriminate is required, must be the same or at least similar under both statutes. In other words, Plaintiffs submit that this Court already has ruled that although some minor differences between the two statutes were contemplated by Congress (*e.g.*, different limitations periods and the availability of punitive damages), the two statutes are basically the same. A holding that a radically different standard of liability is applicable to the two statutes would be completely inconsistent with the holding in *Johnson v. Railway Express.*

It cannot be contended that the above-quoted holding in *Johnson* is merely a holding that the "relief" principles under the two statutes are the same. When Mr. Justice Blackman spoke of the "remedies available" under the two statutes being "directed to most of the same ends", he was doing so in the context of a general discussion of the import and meaning of the two statutes. Therefore, the holding that the "remedies available" under the two statutes are "co-extensive" and "directed to most of the same ends", is a holding that both statutes are directed at remedying "most of" the

same wrongs. Perhaps another way of stating the same point is to point out that the only way the "remedies available" under the two statutes can be "co-extensive" is to have the same basic standards of liability under both statutes; otherwise the "remedies available" are not "co-extensive" since many wrongs would not be remedied under Section 1981 if an intent standard of liability were to be imposed while a non-intent standard is applicable to Title VII.

Plaintiffs believe it to be most noteworthy that at the time Congress stated that the "remedies available" under Title VII and Section 1981 are "co-extensive", Congress was aware that in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court had ruled that purposeful or wilful discrimination need not be proven under Title VII. Indeed *Griggs* was cited and the non-intent standard was discussed at pages 21 and 22 of H.R. Rep. No. 92-238 (1971), which is only two pages subsequent to the House Report expression of the Congressional will that the two statutes are "co-extensive."

Public policy considerations militate in favor of following the thrust of *Johnson v. Railway Express Agency* and making the remedies available under Title VII and Section 1981 truly "co-extensive" by applying the Title VII non-intent standard to Section 1981. In fact, it appears to Plaintiffs that if the intent standard proposed by Defendants is incorporated into Section 1981, in reality the holding would constitute the "death knell" of most important employment discrimination litigation under Section 1981. This is the case because as this Court recognized in the reference to the fox and stork

parable in *Griggs v. Duke Power Co.*, 401 U.S. at 431-32, legislation prohibiting employment discrimination would be of no real value to minorities if the only employment discrimination prohibited is intentional discrimination and if " 'built-in headwinds' for minority groups [which] are unrelated to measuring job capability" are to be allowed to continue to exist.[4] Plaintiffs submit that to make Section 1981 a virtually valueless statute would hardly be consistent with the Court's ruling in *Johnson v. Railway Express Agency* that it is in the public interest to afford "remedies" in the two statutes which are "directed to most of the same ends". *Id.* at 461.

Since Title VII is in full force and effect and currently available to all employment discrimination grievants, it might "at first blush" seem that there is no practical need to follow *Johnson v. Railway Express* and make the remedies available under Section 1981 truly coextensive with Title VII.

There are a great many practical considerations militating in favor of retaining Section 1981 as a meaningful alternative to Title VII, including:

(a) As this Court recognized in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975), the "choice" to employment discrimination grievants of whether to proceed under the Title VII administrative route or to proceed directly to Federal Court under Section 1981 "is a valuable one". The instant case is an example of

[4]As early as 1969 the commentators recognized that unintentional discrimination is "a critical factor in minority unemployment and underemployment." Cooper & Sobol, "Fair Employment Criteria", 82 Harvard Law Review 1598, 1599 (1969). Another more recent commentator, perhaps overstating the case, has said that overt discrimination is now "virtually extinct." Lopatka, "Federal Regulation of Employment Discrimination", 1977 University of Illinois Law Forum 69, 71.

where the usual administrative delays under Title VII would have been severely prejudicial to the Plaintiffs and the represented class had they not been able to proceed directly to Federal Court under Section 1981.[5] The availability of relief by way of preliminary injunction is much more likely to be available under Section 1981 than under Title VII.

(b) The extremely short statute of limitations found at Section 706(e) of Title VII for filing charges with the EEOC often means that the only cause of action a grievant may have preserved is under Section 1981. The availability of a longer statute of limitations in the non-intentional discrimination situation is important because the victim of such discrimination may not be immediately aware of the wrongs committed.

(c) For public employers such as Defendants, who were not covered by Title VII until March, 1972, unless a non-intent standard is applied to Section 1981, meaningful relief would not be available for discriminatory practices carried out subsequent to 1964 when the non-intent standard was first recognized by Congress, but prior to March, 1972, despite the fact those practices may have operated to exclude minorities totally as in the instant case.

(d) Title VII requires claimants to negotiate a complex administrative scheme before proceeding in Federal Court and claimants normally are not

[5]In the instant case the first complaint filed on January 11, 1973 was not based on Title VII (R. 1). It was not until May, 1973 that Title VII allegations were made by way of a Second Amended Complaint (R. 60), after the requisite Title VII administrative procedures had been exhausted. As noted above, it was the First Complaint which triggered Defendants' alteration of their discriminatory hiring program.

represented by counsel in these administrative proceedings. For example, under Section 706(c) of Title VII if a claimant fails to file his grievance with an appropriate State agency and the EEOC fails to "defer" his charge to such an agency, the Federal Courts do not have jurisdiction in a subsequent action under Title VII. If Section 1981 is preserved, with a non-intent standard, under such circumstances Section 1981 can serve as a "fall back" when defects arise in the Title VII procedures.

The consequences of a holding that purposeful discrimination is necessary to make out a Section 1981 violation can be graphically illustrated in the instant case. In the instant case if an intent standard is applied to Section 1981, there might be no significant remedial relief despite the following facts: (a) until this lawsuit was brought the Los Angeles County Fire Department employed virtually *no* blacks (one-half of one percent) and very few Mexican-Americans (2.8%) despite the fact there is a large black and Mexican-American population in Los Angeles County (R. 163); (b) the District Court found that "[d]efendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department . . ." (R. 163); (c) the District Court recognized that even after the effective date of Title VII and "until learning that this lawsuit was about to be commenced" Defendants were continuing to utilize written tests which were artificial barriers and which operated to exclude minorities from employment (R. 163); (d) as discussed above in the "Statement of the Case", Section "B", Defendants were acutely aware that their employment practices operated to exclude minorities and were artificial barriers (See attached Appendix

"A", p. 3), but nevertheless continued to utilize the artificial barriers; and (e) the District Court found it to be in the "public interest" to enter a hiring order which would "accelerate the elimination of the racial imbalance . . . caused by the past discrimination of Defendants" (R. 161).

Defendants' arguments regarding public policy found in their memorandum at Section "III", to the effect that Plaintiffs' position would encourage a bypassing of the Title VII administrative procedures, misses a basic point. That point is that this Court already has recognized that it is consistent with public policy and the intent of Congress to provide Plaintiffs in employment discrimination cases with "alternative means" for redressing employment discrimination grievances. *Johnson v. Railway Express Agency, supra,* at 459, 461.

C. In Pari Materia

Concerning Plaintiffs' contention that the canon of statutory construction known as *in pari materia* should be applied to Title VII and Section 1981, two preliminary points must be made. The first is that when this Court held in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that lack of intent to discriminate is irrelevant to liability in a Title VII case, it was made clear that the Court was applying a term or provision of Title VII "plain from the language of the statute". *Id.*, at 429-30. The second point is that this Court's holding in *Johnson v. Railway Express Agency* that discrimination in employment is prohibited by Section 1981 means, of course, that Title VII and Section 1981 are overlapping in their coverage and deal with the same subject matter, namely employment discrimination.

With these two points in mind, it is most important to note that it is a long-established canon of statutory

construction that when "several Acts of Congress [deal] with the same subject matter, [they] should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones." *Cope v. Cope*, 137 U.S. 682, 688-89 (1890).

Similarly more than a century ago the Supreme Court held as follows in *United States v. Freeman*, 3 How. 556, 564-65 (1845):

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in pari materia are to be taken together, as if they were one law. (Doug., 30; 2 Term. Rep., 387, 586; 4 Maule & Selw., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and *if it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.* (Morris v. Mellin, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.)" (Emphasis added).

Other more recent cases following the *in pari materia* canon of statutory construction include *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-94 (1967) and *NLRB v. Driver's Local Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit."). Similarly in

Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) the principle was applied in a criminal law context. Here Mr. Justice Marshall, writing for the Court, indicated that it is not appropriate to apply the principle when the two statutes were not "intended to serve the same function". 409 U.S. at 245. In the situation now before this Court it has, of course, already been recognized by this Court that the two statutes "are directed to most of the same ends". *Johnson v. Railway Express Agency, supra* at 461.

This Court has applied the *in pari materia* principle in a case strikingly similar to the instant case. In *Hunter v. Erickson*, 393 U.S. 385, 388 (1969), the *in pari materia* canon was applied in such a way that a statutory provision found in the Civil Rights Act of 1968, Title VIII, 42 U.S.C. §§3601 *et seq.* ("Title VIII") was incorporated into 42 U.S.C. §1982 ("Section 1982"). This situation is, of course, virtually identical to the instant case because the juxtaposition of Title VIII and Section 1982 in *Hunter v. Erickson* is identical to the juxtaposition of Title VII and Section 1981 in the instant case. Indeed both Section 1981 and Section 1982 are part of the Civil Rights Act of 1866.

Mr. Justice White wrote the opinion for the Court in *Hunter v. Erickson*. Citing two cases for the *in pari materia* principle, he held that a provision in Title VIII must be applied to Section 1982 because the two statutes "should be read together". The legislative history of Title VII shows a Congressional desire for a similar "reading together"of Title VII and Section 1981 in such a way that the no-intent Title VII standard is part of Section 1981. Senator Harrison Williams, Senate Floor Manager for the bill which amended Title VII in 1972, and one of its original sponsors, specifically stated as follows during floor debate:

"The paramount national interest embodied in the elimination of employment discrimination is both an expression of congressional intent and judicial interpretation. While we have generally denounced employment discrimination, the courts, which have been in a better position to view the devastation which this type of discrimination wreaks upon our social framework, have been even more adamant. One need only read the recent decision by Mr. Chief Justice Burger in Griggs against Duke Power Co., to see the concern that the courts have. In describing the scope of the act the Court stated:

'The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation.'

"Accordingly, the courts have repeatedly proposed a multifaceted approach to employment discrimination, to bring to bear the full force of the law on this problem.

"The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. *In any case, the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.*" Cong. Rec. 3371 (1972) (emphasis added).

It should be noted that in the above quote, Senator Williams evidenced a Congressional desire that Section 1981 and Title VII "provide alternative means" to redress employment discrimination grievances. Plaintiffs would point out that unless Title VII and Section 1981 both have a non-intent standard of liability, the only cases where "alternative means" of relief would be provided would be in the intentional discrimination situation. In view of the fact that in the debate quoted above, Senator Williams specifically endorsed the idea of "alternative means" to redress grievances, at exactly the same time he endorsed the *Griggs* non-intent Title VII standard, it cannot be seriously contended that the desire for "alternative means" to redress grievances was limited to cases of intentional or wilful discrimination.

Plaintiffs believe that the analysis set forth in the above-quoted statement by Senator Williams reflects the correct public policy considerations in the instant case. A reading of Section 1981 under which intent would be required for liability would not be consistent with the desired policy of affording "alternative means" to achieve what Senator Williams referred to as "the paramount national interest . . . in the elimination of employment discrimination." Cong. Rec. 3371 (1972). Nor would an intent standard for Section 1981 be consistent with this Court's recognition in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), that employment discrimination is "an historic evil of national proportions."

Another very important public policy consideration militating in favor of applying the *in pari materia* canon to Title VII and Section 1981 is that to do otherwise undoubtedly will cause inconsistency, confusion and uncertainty in the law. This will be the case because if the two statutes are not to be "read together",

the result will be that what is legal under one statute may be illegal under the other and *vice versa*. For example in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-354 (1977), this Court recently ruled that due to the "bona fide seniority system" provision found at Section 703(h) of Title VII, an otherwise legitimate seniority system is not illegal despite the fact the system may perpetuate discrimination carried out prior to the effective date of Title VII. If the *in pari materia* principle is to be applied to Title VII and Section 1981, the holding in *Teamsters* would be incorporated into Section 1981. By contrast, however, if Defendants' position is accepted and if the two statutes are to have different standards, it would follow that the seniority system found legal under Title VII in *Teamsters* would be illegal under Section 1981; this is the case because the pre-1965 segregated seniority systems constituted purposeful discrimination and due to the fact Section 1981 does not contain Title VII's Section 703(h) "bona fide seniority system" exception.

Two Circuit Courts of Appeal already have dealt with the above-described situation and, without using the phrase *"in pari materia"*, have incorporated Section 703(h) of Title VII into Section 1981. *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92, n. 37 (5th Cir. 1978). If the *in pari materia* canon is not to be applied to Title VII and Section 1981, the validity of these two Circuit Court holdings is at best doubtful, thereby causing confusion and uncertainty in the law despite a clear and specific ruling by this Court on the Section 703(h) point in *Teamsters*.

Defendants argue in their memorandum at Section "I.A." that Section 1981 should be read in congruence with Section 1982 and the other sections which originally were part of the Civil Rights Act of 1866. Defendants then point out that in *Jones v. Mayer*, 392 U.S. 409 (1968) this Court ruled that: (a) Title VIII of the Civil Rights Act of 1968 did not "affect" Section 1982; and (b) that racially "motivated" housing discrimination is prohibited by Section 1982.

As to the fact that in *Jones* the Court held that the enactment of Title VIII "had no effect" upon Section 1982, Plaintiffs would note that this holding went only to the point that Title VIII did not repeal Section 1982. It cannot possibly be, as Defendants contend, that this Court meant in *Jones* that the *in pari materia* principle is not applicable to Title VIII and Section 1982 because in 1969, only one year after *Jones*, as discussed above this Court in *Hunter v. Erickson* applied the *in pari materia* principle to Title VIII and Section 1982.

As to the point that Section 1982 should be read consistently with Section 1981, by this argument Defendants misapply the *in pari materia* principle. This canon of statutory construction is not that different parts of a statute covering different subject matter areas are to have the same standards of liability; rather, as discussed fully above, the *in pari materia* canon requires consistent interpretations of different statutes covering the same subject matter in order to have consistency in the law.

Defendants vigorously contend at Part "II.B." of their Brief before the Court that if the Title VII non-intent standard is to be applied to Section 1981, it would constitute a retroactive application of Title VII. Defendants further argue that such a retroactive application of Title VII would be in violation of the Court's holdings in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

Plaintiffs' response to this argument is that in the instant case Plaintiffs are not asking for a retroactive application of Title VII. Plaintiffs are asking only for a recognition, by way of application of the *in pari materia* principle, that by 1964 when Congress first enacted Title VII, prohibited discrimination in employment had come to include, among other things, the non-intentional erection of artificial barriers to minority employment. At least as of that date, the discrimination prohibited by Section 1981 should include non-intentional artificial barriers. There is thus no "retroactive" application of Title VII implicit in Plaintiffs' position, but only an application of the *in pari materia* principle *as of* 1964 when Congress defined prohibited employment discrimination to include non-wilful artificial barriers to minority employment.

D. Washington v. Davis

The principal thrust of Defendants' argument in their Memorandum to this Court is that *Washington v. Davis*, 426 U.S. 229 (1976) requires a holding that wilful or purposeful discriminatory intent must be shown to establish liability under Section 1981. It appears to Plaintiffs that this reliance upon *Washington v. Davis* is misplaced to the extent that in *Washington v. Davis* it was held, or at least assumed, that a non-intent standard applies to Section 1981. This is the case because a careful reading of the opinion in *Washington v. Davis* shows that:

> (a) the decision in *Washington v. Davis* that purposeful discrimination is necessary to make out a violation, found in Part "II" of the *Washington v. Davis* opinion, is strictly limited to cases based on the equal protection provisions of the Fifth and Fourteenth Amendments and does not extend to cases grounded on statutes; and (b) in Part "III" of the *Washington v. Davis* opinion, in which Section 1981 and a local District of Columbia statute are construed, this Court specifically interpreted and construed Section 1981 and in doing so placed the burden of proving "business necessity" upon employers sued under Section 1981 upon a mere statistical showing of adverse impact without a showing of purposeful discrimination.

A review of the procedural context in which *Washington v. Davis* reached the Court is helpful. In Part "I" of the Court's opinion, the procedural setting giving rise to the appeal is described at 426 U.S. 233-34 as follows:

> "These practices [including the written test] were asserted to violate respondents' rights 'under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. §1981 and under D.C. Code §1-320.' * * * Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is 'unlawfully discriminatory and thereby is in violation of the due process clause of the Fifth Amendment. . . .' *No issue under any statute or regulation was raised by the motion.* The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case asserting that respondents were entitled to relief *on neither constitutional nor statutory grounds.*" (Emphasis added; footnotes omitted.)

Part II of the Court's opinion is limited to a discussion of the issues involved in the respondent's motion which "rested on purely constitutional grounds. . . ." The Court premised its remarks in Part II by stating

that "We have never held that the *constitutional standard* for adjudicating claims of invidious racial discrimination is identical to the standard applicable under Title VII, and we decline to do so today." (emphasis added). After a long discussion of equal protection cases brought under the Fifth and Fourteenth Amendments and 42 U.S.C. §1983, this Court held that purposeful discrimination must be shown to establish a claim under the *constitutional* equal protection provisions. The Court, therefore, concluded as follows:

> "Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving the *constitutional* issues before it, we reverse its judgment in respondents' favor." 426 U.S. at 238. (Emphasis added.)
>
> * * *
>
> "[I]t was error [for the Court of Appeals] to direct summary judgment for respondents based on the Fifth Amendment." 426 U.S. at 248.

In Part "III" of the *Washington v. Davis* decision, this Court then proceeded to discuss the issues involved in the *petitioners'* summary judgment motion that were not disposed of by its holding in Part "II." Thus, Part "III" deals exclusively with the issues concerning the statutory causes of action under Section 1981 and D.C. Code §1-320, the constitutional issues having been disposed of in Part "II." And, most importantly, in this Part "III" the Court applies the non-intent standard of Title VII, to wit: a mere statistical showing that an employment practice has an adverse impact upon a minority group shifts the burden to the employer to prove job-relatedness regardless of whether purposeful or wilful discrimination has been shown.

There can be no real question but that in Part "III" of the *Washington v. Davis* opinion, the Court

was construing Section 1981 along with a District of Columbia local code section. The second paragraph of Part "III" of the opinion specifically notes that the Defendant employer's motion for summary judgment (which is what was being discussed in Part "III") was based upon an argument that the written test at issue "complied with *all* applicable statutory . . . requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." (Emphasis added.) Since the Court in the first paragraph of Part "I" of the opinion specifically noted that the case was brought under Section 1981, and indeed in footnote two quoted Section 1981 in its entirely, and since the Court in Part "III" as quoted immediately above stated that it was construing "all applicable statutes" (plural, not singular), and since Title VII principles were applied by the Court in Part "III" of the *Washington v. Davis* opinion, it follows that this Court has adopted and applied Title VII principles while construing Section 1981. It is most noteworthy that the Title VII principle applied under Section 1981 in Part "III" of *Washington v. Davis* was the very principle at issue in this case —whether in the absence of purposeful discrimination the burden to prove job-relatedness shifts to the employer upon a showing of statistical adverse impact.

The instant case also is distinguishable from *Washington v. Davis* because the public policy considerations in that case which underlie the holding that purposeful discrimination must be shown to make out a constitutional violation, are not applicable to Section 1981. The policy considerations in *Washington v. Davis* were stated at 426 U.S. 248 to be that if the non-intent standard were applied to the Fifth and Fourteenth Amendments, it "would raise serious doubts about,

and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes. . . ." By contrast, if the *in pari materia* principle is applied to Title VII and Section 1981 no such result would occur because the Title VII non-intent standard would be applied only to that part of Section 1981 also covered by Title VII, namely employment contracts.

In *Washington v. Davis,* this Court was, of course, not in a position to apply the *in pari materia* principle, and thereby limit the application of the non-intent standard to employment cases arising under the Fifth and Fourteenth Amendments, because in *Washington v. Davis* Constitutional provisions were being construed and it would not have been appropriate to rule that Constitutional standards are to be "read together" with statutory standards or that Constitutional standards are to be altered by legislation.

Throughout Defendants' brief, and particularly at Part "I.A.", it is argued that since under *Washington v. Davis,* Constitutional standards require intentional discrimination, to impute a non-intent standard to Section 1981 is not appropriate because Section 1981 has its historical foundations in the Thirteenth and Fourteenth Amendments. In response plaintiffs would point out that it is settled law that Congress may enact legislation pursuant to the enforcement authority provided by the Thirteenth and Fourteenth Amendments, which may afford civil rights protections not precisely afforded by the Constitutional provisions themselves. See *e.g., Katzenbach v. Morgan,* 384 U.S. 641, 650-51 (1966). It is, of course, through operation of the *in pari materia* principle that Congress, in effect, has promulgated the non-intent standard for Section 1981.

At page 32 of Defendants' brief, with accompanying footnote six, it is stated that since this Court's decision in *Washington v. Davis,* "the majority" of the Circuit

and District Courts have imputed an intent standard into Section 1981. In their opposition to the petition for certiorari Plaintiffs already have analyzed in detail all of the Court of Appeals cases cited by Defendants in footnote six. That analysis does not bear repetition here, save to say that the analysis showed that in none of the Court of Appeals cases cited was it held that an intent standard is applicable to Section 1981 cases.

As against this total lack of authority at the Court of Appeals level in support of Defendants' position, it is noteworthy that in addition to the Ninth Circuit in the instant case, since *Washington v. Davis* was decided three Circuits have held that Title VII principles are applicable in cases brought pursuant to Section 1981. *Kinsey v. First Regional Securities, Inc.,* 557 F.2d 830, 838, n. 22 (D.C. Cir. 1977); *Johnson v. Ryder Truck Lines, Inc.,* 575 F.2d 471 (4th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1191-92, n. 37 (5th Cir. 1978).

E. Legislative History

Defendants contend in their memorandum before this Court, without citing any relevant Congressional debates or committee reports, that in 1866 when Congress enacted Section 1981, Congress could not possibly have had a non-intent standard in mind.

Plaintiffs would note that the legislative history of Section 1981 evidences a Congressional intention that Section 1981 should "secure to all persons within the United States *practical* freedom." (emphasis added) *Congressional Globe,* 39th Congress, 1st Session 474 (1866) (Remarks of Senator Trumbull, author of Section 1981 and chairman of the Senate Judiciary Committee). The point is, of course, that as this Court noted in *Griggs,* as fully discussed above, the only

way to afford "practical freedom" in modern times in the field of employment discrimination is to apply a non-intent standard to artificial barriers to minority employment. *Griggs, supra*, 401 U.S. at 431. Indeed not to afford "practical freedom" by a non-intent standard in the employment field hardly would be consonant with this Court's recognition, while construing Section 1982 in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) that the protection "meant to be afforded" by Section 1 of the Civil Rights Act of 1866 was "broad and sweeping [in] nature."

F. Reliance

If this Court accepts Plaintiffs' position and rules that the *Griggs* non-intent standard is applicable to employment cases brought under Section 1981, no employer will be prejudiced due to surprise. This is true because, simply enough, for almost a decade the Federal Courts consistently have held that Title VII principles generally are applicable in Section 1981 employment discrimination cases. See, *e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *King v. Laborers International Union, Local No. 818*, 443 F.2d 273 (6th Cir. 1971); *Young v. I.T.T.*, 438 F.2d 757 (3rd Cir. 1971); *Shield Club v. City of Cleveland*, 538 F.2d 329 (6th Cir. 1976).

One of the ironies in the instant case is that the very Defendants involved long have assumed that a non-intent standard applied to Section 1981. This is the case because in 1971, well before Title VII applied to public entities, the head of the County of Los Angeles Personnel Department wrote the memorandum which was Plaintiffs' Exhibit 8 below and which is attached hereto as Appendix "A". This memo at page 3 shows beyond any real doubt that Defendants assumed that the *Griggs* non-intent standard was applicable to them despite the fact Title VII was not yet so applicable.

It also is noteworthy that a ruling for the Defendants in the instant case will result in prejudice to those employment discrimination plaintiffs who, upon reliance of cases such as those cited above, have considered it to be long-settled law that non-intent standards apply in Section 1981 cases. There undoubtedly are many such cases based on Section 1981 currently pending in the Federal Court system.

II
THE RECORD HERE SHOWS INTENTIONAL DISCRIMINATION

Should the Court disagree with the Plaintiffs' position immediately above in Section "I" of the Argument, Plaintiffs nevertheless are entitled to an affirmance. This is the case because there is no real doubt but that the record below shows Defendants had engaged in intentional and purposeful discrimination.

A proper analysis of the situation begins with the fact that at the time the District Court found as a fact that Defendants had not engaged in "wilful or conscious" discrimination (R. 162), the District Court believed the holding to be of no importance. This is clear because at Conclusion of Law No. 7, the District Court held that the only intent required in the case was an intent to use the non-job-related employment practices which had the "effect" of discriminating (R. 163-64). Indeed a colloquy during trial between Plaintiffs' counsel and the District Court Judge shows that, contrary to the finding that no "wilful or conscious" discrimination had been engaged in, the District Court assumed that such wilful discriminatory intent existed but believed that the existence of such intent

was of no significance. The colloquy, found at pages 112-13 of the trial transcript, reads as follows in relevant part:

> "THE COURT: Mr. Hunt, I want to consider everything that might be relevant to the issue here concerned. But I can assure you I am not going to be impressed with proof that the fact that the fire department has a battalion chief, or whatever it is, that is myopic as far as reasons for giving a person a low rating are concerned, and whether or not [you] can relate that to the activities of this witness in trying to promote racial integration in the fire department.
>
> *"I am perfectly willing to assume that there are officials in the fire department who would take offense at such doings. But that has nothing to do with what this Court feels called upon to consider.*
>
> * * *
>
> "THE COURT: *You don't have to present testimony to establish to this Court that there are people in the fire department who would not like to have a minority increase in the roll. There is no doubt about that.*" (emphasis added).

Under these circumstances Plaintiffs submit that the District Court's finding of no intentional discrimination by Defendants is of little meaning or value. This is particularly true since the record in the instant case is replete with evidence of intentional discrimination and as this Court recognized in *Washington v. Davis,* 426 U.S. 229, 242 (1976), "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts". Firstly, the statistics showing virtually *no* minority firefighters, despite a large minority population in Los Angeles County, raises an inference of purposeful discrimination. See *Castaneda v. Partida,* 430 U.S. 482, 494-95 (1977). Defendants did nothing to rebut that inference of intentional discrimination.

Not only did Defendants not rebut the inference of intentional discrimination raised by the employment statistics, but indeed Chief Barlow of the County Fire Department admitted that he had his "personal suspicions" about "intentional foot-dragging". His testimony concerned the loss of a large number of application slips from minority applicants; Chief Barlow testified that his "personal suspicions" were that the slips had been lost "because of some *intentional* foot-dragging on the part of some fire department personnel, [due to] the thought of minorities being added to the fire department" (emphasis added) (Tr. 187-88).[6]

Other evidence of intentional discrimination in the record below concerns the fact that Defendants permitted white firefighters to bring their white friends and relatives into County fire stations in order to prepare and assist those friends and relatives in the County's application and testing process for the firefighter job. When, however, a Captain in the Fire Department began doing the same for minorities, he was ordered to cease his activities. Despite this occurrence, the practice of permitting white applicants on County premises to "practice" for the tests and interviews was allowed to continue after it had been ordered halted for minorities (Tr. 98-110).

It also is most noteworthy, as to whether there was intentional discrimination on the part of Defendants, that as is fully described in Section "B" of the "Statement of the Case" above, Defendants continued to use discriminatory non-job-related written tests de-

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[6]Chief Barlow's complete testimony on this point is attached hereto as Appendix "B".

spite their express *knowledge* that such tests were illegal under Title VII and indeed their assumption that such tests were illegal under Section 1981 (See attached Appendix "A"). It also is most noteworthy that this use of discriminatory written tests continued until 1973 and ceased only due to the instant lawsuit, despite the knowledge of the head of the personnel department as early as prior to 1969 that Defendants' written tests excluded minorities disproportionately (Tr. 42-43) and despite the knowledge of that department head that the tests were not job-related as ranking devices (Tr. 55-56). In this vein it is most noteworthy that this Court held in *Washington v. Davis,* 426 U.S. 229, 241 that evidence of disproportionate impact is relevant under the intent standard of liability of the Fifth and Fourteenth Amendments. Plaintiffs submit that *knowing* use of non-job-related tests while knowing that they operate to exclude minorities, is tantamount to a purposeful "intent" to exclude minorities.

This Court should be aware that before the Ninth Circuit Court of Appeals, Plaintiffs contended that if an intent standard is to be imputed to Section 1981, Plaintiffs have satisfied that standard and that the finding by the District Court of no intentional discrimination was "clearly erroneous." (See Plaintiffs/Appellees' Brief In Opposition To Petition For Rehearing). The Ninth Circuit, of course, did not reach the point since it applied a non-intent standard to Section 1981.

III
THE DEFENDANTS' STANDING ARGUMENT IS NOT PROPERLY BEFORE THE COURT.

At point "V" of Defendants' brief before this Court, it is argued that because the Ninth Circuit Court of Appeals has ruled that the Plaintiffs lacked standing to represent past applicants, the hiring order below cannot possibly be appropriate since the hiring order in this case is one designed to "eliminate the effects of past discrimination. . . ." (R. 164). Defendants' logic seems to be that since *past* applicants were not represented in this lawsuit, relief to remedy the effects of *past* discrimination is not appropriate.

Plaintiffs have no real argument with the basic logic of Defendants' position. Defendants, however, in their argument have misstated the Ninth Circuit's ruling. The Ninth Circuit ruled only that because the *class* did not include past applicants, the Plaintiffs lacked standing to challenge a written test administered in 1969. The exact holding of the Ninth Circuit, found at 566 F.2d 1337, is as follows: "*In light of the fact that* plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination." The Court of Appeals then ordered the case remanded for reconsideration by the District Court of the hiring order it had entered, in view of the various holdings it had made including, in particular, the holding as to standing. 566 F.2d 1343.

Plaintiffs submit that at this stage of the proceedings Defendants cannot complain about the District Court's

hiring order on standing grounds. The point is, simply enough, that the Court of Appeals already has ordered the District Court to reconsider the hiring order it issued in view of the Court of Appeals holding on standing; therefore, in effect, Defendants are appealing on a point on which they have prevailed.

Plaintiffs did not appeal from the Court of Appeals holding because, upon remand, it will be shown by Plaintiffs that the District Court's definition of the scope of the class to exclude past applicants was a mere oversight on the part of the District Court and the counsel involved. This is the situation because the evidence at trial was fully developed on behalf of past applicants (See, *e.g.*, the stipulations of fact in the Pre-Trial Order, R. 136ff and the testimony at Tr. 30-61). Indeed, the District Court's basic liability holdings and the relief afforded all were based on "past" discrimination (R. 160, 164). Under these circumstances, it is the intent of Plaintiffs, upon the remand, to correct the oversight in which past applicants were excluded from the represented class by way of a motion for reconsideration directed to the scope of the represented class. Once the oversight is corrected, the Ninth Circuit holding that the Plaintiffs have no standing no longer will be applicable.

It cannot be seriously questioned but that the failure to include past applicants in the represented class was a mere oversight. The original complaint was pled on behalf of a class including past applicants (R. 4, lines 21-24). The evidence went to past applicants (See, *e.g.*, R. 137ff). Indeed, in its first opinion dated October 20, 1976, the Ninth Circuit Court of Appeals, in the very first sentence of the opinion, mistakenly stated that past applicants were included in the represented class (See Appendix "B", p. 1 to Petition for Certiorari). Furthermore, at no point in this entire

case, prior to the petition for certiorari to this Court, did Defendants ever make the argument that Plaintiffs lacked standing due to the fact their class did not include past applicants.

Plaintiffs also would note in passing that once the remand is carried out to the District Court, it will be appropriate for the named Plaintiffs to represent past applicants as well as present and future applicants. This is the case because the written tests to which the named Plaintiffs were subjected are virtually identical to the earlier written tests (See Plaintiffs' Exhibits 4 and 5, the tests concerned), thus satisfying the commonality and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure. Indeed, as this Court stated in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 406 (1977): "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present."

The cases which show that Plaintiffs as minority current applicants and minority current employees can represent past applicants, particularly where the challenged employment practices affecting the class are the same or similar to those affecting the named Plaintiffs, are too legion to cite but include: *Gibson v. Local 40, Supercargoes and Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976); *Rich v. Martin Marietta Corporation*, 522 F.2d 333, 341 (10th Cir. 1975) (Plaintiffs allowed to make claims on behalf of a class including persons not engaged in work "identical" to that of the named Plaintiffs); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969) (discharged employee a proper class Plaintiff for a class to include applicants and employees); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547-48 (4th Cir.

1975); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442 (3rd Cir. 1971); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977) (employee Plaintiff has standing to represent applicant class); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976).

IV

THE HIRING ORDER ISSUED BELOW WAS APPROPRIATE

Assuming that past applicants were included in the Plaintiff class, the hiring order entered by the District Court was properly within the Court's equitable remedial discretion. The hiring order is set forth in the Judgment and provides that Defendants shall hire 40% minority firefighters (R. 167). This hiring order was made strictly subject to the proviso that Defendants' hiring standards shall not be lowered (R. 168).

The hiring relief was considered by the District Court to be "necessary to overcome the presently existing effects of past discrimination within a reasonable period of time" (R. 161). The District Court based this hiring order upon its findings that: (1) Defendants failed to rebut the *prima facie* case of discrimination created by the severe disparity between the percentage of blacks (0.5%) and Mexican-Americans (2.8%) in the workforce of the Los Angeles County Fire Department and the percentage of blacks (10.8%) and Mexican-Americans (18.3%) in the general population of Los Angeles County (R. 160); and (2) Defendants had engaged in illegal employment practices by their use of unvalidated written tests that adversely affected black and Mexican-American applicants and by Defendants' failure adequately to recruit blacks and Mexican-Americans (R. 160).

This Court repeatedly has recognized that once a past constitutional or statutory violation has been established, the District Courts have broad equitable discretion in fashioning relief. In *Louisiana v. United States*, 380 U.S. 145 (1965), it was stated that:

> "We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 154.

The hiring relief ordered by the District Court is consistent with the judgment of this Court announced by Mr. Justice Powell in *Regents of the University of California v. Bakke*, ... U.S. ...., 57 L.Ed.2d 750 (1978). Justice Powell stated at 57 L.Ed.2d 778-79 that:

> "The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified. race-based injuries to individuals held entitled to the preference. *E.g., Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F. 2d 1333 (CA2 1973); *Carter v. Gallagher*, 452 F. 2d 315, modified on rehearing en banc, 452 F. 2d 327 (CA8 1972). Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 954 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altschuler*, 490 F. 2d 9 (CA1 1973), cert. denied, 416 U.S. 957 (1974); cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966)." (footnotes omitted.)

The scope of the hiring relief also was well within the District Court's equitable discretion. The basic re-

straint on a District Court's discretion is that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971). In the instant case, the hiring relief "mirrors" the past violations (*i.e.,* for *prima facie* case finding) for it was designed to cause the representation of blacks and Mexican-Americans in Defendants' workforce to attain the level it would have reached but for the past discrimination.

Virtually identical hiring relief was endorsed by this Court in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). In *Teamsters,* the consent decree provided for prospective relief that was described as follows at 431 U.S. 330-331, n.4:

> "The decree further provided that future job vacancies at any company terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but *the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal.*" (Emphasis added).

This Court then approved this hiring order in the consent decree as proper injunctive relief when it stated at 431 U.S. 361, n. 47 that:

> "The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of §707(a) [of Title VII]

> eliminate their discriminatory practices and the effect therefrom. * * * In this case prospective relief was incorporated in the parties' consent decree. See *supra,* at 330-1, n.4."

It is also significant to note that the hiring relief in the *Teamsters* consent decree was based upon findings analogous to those made by the District Court in the instant case. This Court in *Teamsters* held that a *prima facie* case of discrimination had been shown by the disparity between the representation of minorities in the company's workforce and that in the general population. 431 U.S. at 337, n.17. It also was concluded at 431 U.S. at 339, n. 20 that:

> "[A]bsent explanation, it is ordinarily to be expected that non discrimination will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

Finally, the prospective hiring relief is equitable in nature and hence, the scope of the relief should not be limited, as Defendants suggest, to remedying only the effects of past discriminatory acts within the statute of limitations period. As stated in *Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946),

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See Russell v. Todd, supra (309 US at 289, 84 L ed 761, 60 S Ct 527).

* * *

> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' Galliher v. Cadwell, 145 US 368, 373, 36 L ed 738, 740, 12 S Ct 873. See Southern P. Co. v. Bogert, 250 US 483, 488, 489, 63 L ed 1099, 1106, 1107, 39 S Ct 533. And so, a suit in equity may lie though a comparable cause of action at law would be barred."

See also *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951); *Allen v. Amalgamated Transit Union, Local 788*, 544 F.2d 876 (8th Cir. 1977).

Defendants are in no way prejudiced by a prospective hiring order that remedies the effects of past illegal discrimination that took place prior to the three year statute of limitations period. Furthermore, the District Court's decree specifically subordinates the numerical hiring goals to the availability of qualified applicants and, in fact, allows Defendants to increase their qualification standards for employment of firefighters so long as such standards are job-related (R. 168). It, therefore, was proper for the District Court "to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

The relief found by this Court to be appropriate in school desegregation cases illustrates that statutes of limitations have not been used to limit the District Court's discretion, awarding broad and effective equitable relief in discrimination cases. For example, in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), the constitutional violation found

by the District Court was "locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods," 402 U.S. 7. The relief granted by the District Court, and approved by this Court, involved a comprehensive plan to desegregate the entire school system. Clearly, the desegregation plan was intended to eliminate entirely the dual school system that had been created by discriminatory siting and assignment decisions over an extended period of time. It was not limited to eliminating the effect of discriminatory sitings and assignments within the statute of limitations period.

Conclusion

For the reasons stated above, Plaintiffs respectfully submit that the decision of the Ninth Circuit Court of Appeals in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977) should be affirmed.

Dated: November 1, 1978

Respectfully submitted,

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Center for Law in the Public Interest,
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Attorneys for Respondents.

APPENDIX "A".

May 19, 1971

TO: Civil Service Commission

FROM: Gordon T. Nesvig

SUBJECT: POLICY ON THE USE OF PROMOTIONAL EXAMINATIONS ON TUESDAY, APRIL 6, 1971

On Tuesday, April 6, 1971, the Board of Supervisors passed a motion urging that the Civil Service Commission rescind the promotional examination for Fireman and give an open competitive examination instead. On Wedneday, April 7, 1971, the Civil Service Commission ordered the promotional examination for Fireman rescinded and indicated that the examination should be ordered on an open competitive basis.

After reviewing all of the evidence prepared by my staff, I still believe that the decision to give a promotional examination was appropriate. I would like to present the following information as a basis for influencing future policy decisions of the Commission regarding the County's Affirmative Action Program.

Section 19101 which was added to the Administrative Code on October 11, 1969, as a result of the Board's desire to provide equal employment opportunity provides not only for more intensive recruitment of minorities for County jobs, but also provides for upgrading the large number of minority employees who are dead-ended in first and second level jobs. This far-reaching personnel policy applies to all County employees. It should be made clear that in the implementation of the County's Affirmative Action Program we will in no way knowingly discriminate against any group. Our

program is designed to provide expanded opportunities for all County employees, with an emphasis on eliminating barriers to the promotion of minorities.

It has been a consistent County policy to give promotional examinations when adequate competition exists within the County service. This policy is based on a County Charter requirement and is fully detailed in Civil Service Commission Rule 8.05.

As part of our effort to implement the Board's Affirmative Action policies we have been reviewing all examinations to insure that we provide County employees their promotional rights in those cases where adequate competition exists within County service. A recent example of the application of this policy was the interdepartmental promotional examination for Apprentice positions. Although these examinations had previously been given on an open competitive basis, we felt that we were denying opportunities to existing employees with related experience within County service.

The Fireman examination is another example in which Civil Service Commission Rule 8.05 appears applicable. Although we may exhaust the competition for this class within County service after one or two promotional administrations of the examination, we believe that adequate competition now exists within County service to justify a promotional examination.

The large filing (5,000-10,000) anticipated on an open competitive Fireman examination would require the use of a written test or an alternative untested procedure to select out 600 of the applicants for the interview portion of this examination. A promotional examination would result in a filing of approximately

600 applicants and would preclude the need to use a testing device which may discriminate.

I request the Commission's continued approval to provide promotional examinations in all cases where Civil Service Commission Rule 8.05 is determined to be applicable, with a heavy emphasis on those classes which are currently underrepresented by minorities.

rb

FACT SHEET ON THE FIREMAN EXAMINATION

1. Of 1795 Firemen in Los Angeles County only 10 are Black, 40 Brown, and 1 Oriental.
2. A great deal of the alienation between minority residents and the Fire Department results from the lack of adequate representation of minorities in the fire service. The brick-throwing we have experienced at several fires not only presents a hazard to County Firemen but results in greater fire losses than would otherwise occur.
3. The current test for Fireman *does* discriminate against minorities. (Although we had over 407 Blacks applying for Fireman the last time this test was given, only four were within appointment range on the list and hired. Of 126 Chicanos, only 5 were within reach on the list and subsequently hired.)
4. A recent Federal Supreme Court decision on testing, Griggs et al v Duke Power Company, holds that this type of test is in violation of the Civil Rights Act of 1964.
5. The only alternative which we have thus far found to be a culturally fair way of selecting applicants for the interview portion of the Fireman exam

has been informally determined to be illegal by our County Counsel representative (Random Selection).

6. We are not staffed to interview all of the 5000 plus candidates whom we estimate will apply for Fireman on an open-competitive examination, and the alternative of using our existing written examination as an administrative device for selecting a group of applicants whom we can interview for the Fireman positions (approximately 600 applicants to be interviewed for 80 jobs) places us in the position of knowingly discriminating.
7. We have good reason to believe that adequate competition exists within the County Service for this class. A promotional examination would result in a filing of approximately 600 applicants all of whom could be interviewed.
8. Since 30 to 40% of the County applicants for this class would be minorities, we estimate that a promotional examination would result in approximately 25 minority hires out of a total of 80 new hires.

APPENDIX "B".

THE COURT: You heard Mr. Clady testify yesterday about his Herculean effort to get slips from various people saying "Please let me know when you're going to announce another test." He thinks he collected some 300.

Was this part of the program that you helped to develop?

THE WITNESS: Part. Yes, this was part of the program to accumulate.

THE COURT: He said he developed some 300 of those, turned them in, and found out that no slip, no notices were sent out until just about the eve of the cut-off time, and then as far as he knew, only half were sent out.

Can you evaluate that? Do you know whether or not that occurred?

THE WITNESS: When I was called and told this list of names was not utilized, I requested down through the people responsible within our hierarchy of working with this group, what happened to these names, because our position was that these names would be submitted to the personnel department and they would be utilized in the recruiting effort.

THE COURT: Do you know whether or not it was done?

THE WITNESS: To my knowledge there was a communication problem at this particular time, and that I was not satisfied with the fact that these lists of names were not handled properly in my estimation.

THE COURT: Did you know why they were not handled properly?

THE WITNESS: No, I don't.

THE COURT: Do you have any suspicion or inference that it might not have been handled properly because of some intentional foot-dragging on the part of some fire department personnel, the thought of minorities being added to the fire department?

THE WITNESS: I have my personal suspicions, yes, your Honor.